# Section Five

## INDEPENDENT REGULATORY AGENCIES

In addition to the executive departments and agencies discussed previously, a number of independent commissions exist that are loosely affiliated with the executive branch. In general, the President can appoint people to these commissions but cannot remove them, which makes them constitutionally problematic in light of the Constitution's having vested federal executive power in the President. Nevertheless, they exist, their constitutional legitimacy has generally been upheld by the courts, and there will be an opportunity for the next Administration to use them as forces for good, particularly by making wise appointments.

Few appointments to these commissions will be as important as the President's selection of the next chairman of the Federal Communications Commission (FCC). In Chapter 28, FCC Commissioner Brendan Carr writes that the FCC chairman "is empowered with significant authority that is not shared" with other FCC members. Under a new chairman, he writes, "[t]he FCC needs to change course and bring new urgency to achieving four main goals: [r]eining in Big Tech; [p]romoting national security; [u]nleashing economic prosperity; and [e]nsuring FCC accountability and good governance."

"The FCC," writes Carr, "has an important role to play in addressing the threats to individual liberty posed by corporations that are abusing dominant positions in the market." Nowhere is that clearer "than when it comes to Big Tech and its attempts to drive diverse political viewpoints from the digital town square." Carr writes that the FCC should require more transparency from Big Tech, which today "offers a black box." And it should issue "an order that interprets Section 230"—which provides protection from legal liability to online computer services that

moderate content in good faith—"in a way that eliminates the expansive, non-textual immunities that courts have read into the statute." In addition to taking unilateral action, Carr says, the FCC should work with Congress on legislative changes to ensure that "Internet companies no longer have carte blanche to censor protected speech while maintaining their Section 230 protections."

Carr writes that during the Trump Administration, the FCC took an "appropriately strong approach to the national security threats posed by the Chinese Communist Party." The FCC put Huawei on its Covered List of entities—its list of those posing "an unacceptable risk" to U.S. national security. Carr writes that TikTok also poses a "serious and unacceptable" risk to U.S. national security, while providing "Beijing with an opportunity to run a foreign influence campaign by determining the news and information that the app feeds to millions of Americans," and the next Administration should ban it. What's more, Carr writes, "U.S. businesses are aiding Beijing—often unwittingly"—in its effort to become, by 2030, "the global leader in artificial intelligence." In part, they are doing so by providing "Beijing access to their high-powered cloud computing services." Carr asserts that "it is time for an Administration to put in place a comprehensive plan that aims to stop U.S. entities from directly or indirectly contributing to China's malign AI goals ."

Former Federal Election Commissioner Hans von Spakovsky writes in Chapter 29 that while "the authority of the President over the actions of" the Federal Election Commission "is extremely limited," the President "must ensure that the [Justice Department], just like the FEC, is directed to only prosecute clear violations" of the Federal Election Campaign Act. "The department must not construe ambiguous provisions...in a way that infringes on protected First Amendment activity," he writes. The FEC has six members, three from each party, and its determinations require a majority—so, they require the support of at least one member of each party. DOJ should not "prosecute an individual for supposedly violating the law when the FEC has previously determined that a similarly situated individual has not violated the law," writes von Spakovsky. Moreover, he writes that the "President should vigorously oppose all efforts"—such as the language in the "For the People Act of 2021"—"to change the structure of the FEC" so that it would have an "odd number" of members. The current structure "ensures that there is bipartisan agreement before any action is taken and protects against the FEC being weaponized."

In Chapter 27, David R. Burton writes that the Securities and Exchange Commission (SEC) "should be reducing impediments to capital formation, not radically increasing them" by pushing a costly "climate change" agenda, as it is doing under the Biden Administration. Discussing the Federal Trade Commission, Adam Candeub writes in Chapter 30, "Antitrust law can combat dominant firms' baleful effects on democratic" notions—"such as free speech, the marketplace of ideas, shareholder control, and managerial accountability as well as collusive behavior

with government." Under the Biden FTC, he writes, firms try "to get out of anti-trust liability by offering climate, diversity, or other forms of ESG-type offerings." Candeub says that state AGs "are far more responsive to their constituents" than the federal government generally is, and he recommends that the FTC establish a position in the chairman's office that is "focused on state AG cooperation and inviting state AGs to Washington, DC, to discuss enforcement policy in key sectors under the FTC's jurisdiction: Big Tech, hospital mergers, supermarket mergers, and so forth."